SENATOR KEE YONG WEE & ANOR.

v.

LOW YAT CONSTRUCTION CO. SDN. BHD. & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
VC GEORGE J
[SUIT NO. F 818 OF 1985]
3 JANUARY 1986

CIVIL PROCEDURE: *Ex Parte injunction - Setting aside on variation - Express or implied consent - Acquiescence - Delay - Affidavit evidence.*

CIVIL PROCEDURE: *Injunction - Interlocutory - Section 54(h) of the Specific Relief Act - Acquiescence of the wrong - Serious question to be tried - Balance of convenience.*

The 1st and 2nd plaintiffs (husband and wife) are the owners of two lots of land, lot 125 and 126 respectively. The 1st defendant (a construction company) owned lot 129 which was contiguous to the above lots 125 and 126. The construction company wanted to erect a multi-storey building on its lots and sought the permission of the plaintiffs to instal temporary ground anchors on lots 125 and 126. The purpose of the ground anchors was to provide support for certain walls to be erected in respect of the basement of the proposed building. After the basement walls were put up, these anchors would be removed. The plaintiffs, after consultation with their consultants informed the construction company that they could not accede to the request as the proposed anchorage might affect the plaintiff' proposed development of their lots.

The construction company persevered however and tried to persuade the plaintiffs to give their permission. There was some discussion and negotiation between the parties and this resulted in a draft agreement which was submitted to the plaintiffs on 24 January 1985. There was no response from the plaintiffs and on 10 May 1985, another draft agreement was sent to the plaintiffs. 3 days later, serious cracks were observed on various parts of the plaintiffs' buildings and even on the grounds. The construction company's contractor, 2nd defendant apologized to the 1st plaintiff and undertook to pay compensation to the plaintiffs. Further correspondence took place between the parties and there were meetings to resolve the issue of damage to the plaintiffs' house.

The plaintiffs then obtained an *ex parte* injunction restraining the defendants from carrying on the anchorage work and to remove all installed ground anchors. The defendants' then sought to have this order either set aside or varied. The defendants, contention was that the plaintiff either expressly or impliedly consented to the anchorage and that the plaintiff had acquiesced to the installation.

Held:

[1] Section 54(h) of the Specific Relief Act 1950 deprives a plaintiff of relief by an injunction where there has been acquiescence of the wrong.

[2] On the evidence supporting the contention of acquiescence and delay the plaintiffs would not normally have been entitled to the mandatory orders they sought at the interlocutory stage not in the terms in which they were asked for. It however should not be overlooked that the defendants have all along maintained that they intend to remove the ground anchors and have also suggested a method of doing it.

[3] The order to have the ground anchors removed remained and taking into account the balance of convenience of the parties, justice of the case would be met by a variation of the order of 5 December 1985.

[Plaintiffs to pay costs of this application.]

Legislation referred to:
Specific Relief Act 1950, s. 54(h)

[**Editor's Note:** The notice of appeal was filed on 20 January 1986 under reference Supreme Court Civil Appeal 19 of 1986]

JUDGMENT

VC George J:
(On enclosure (12))

By their letter of 28 June 1984 MMY5 the first defendants Low Yat Construction Co. Sdn. Bhd. sought the permission of Senator Kee Yong Wee as owner of the land known as lot 125 held under C.T. 15348 in s. 43 Town of Kuala Lumpur and as representative of his wife Madam Mah Ming Yuet the owner of lot 126 held under C.T. 15349 in s. 43 Town of Kuala Lumpur to install what were described as temporary ground anchors into the said lots which are contiguous to the first defendant's lot 129 on which the defendants were proposing to erect a multi-storey building. They said that the ground anchors (which were to provide support for certain walls to be erected in the excavation at the site in respect of the basement of the proposed building) would be detensioned and removed after they had put up the basement walls of the proposed building. The anticipated duration of the anchors being in the plaintiffs' land was some 12 months.

The Senator took professional advice on the application and on 7 August 1984 his agents informed the first defendants that the plaintiffs' consultants advised against acceding to the request as the proposed anchorage might affect the plaintiffs' proposed development of their lots. However, they offered co-operation wherever possible.

The first defendants then proceeded to try and persuade the plaintiffs' consultants that the ground anchors could be installed without interfering with the plaintiffs' proposed development and that even if there was such interference, that could be surmounted by incurring extra costs which would be met by the first defendants. There appeared to be some discussion and negotiations between the parties and or their servants and agents which resulted in the first defendants' people preparing and sending to the plaintiffs' consultants a draft agreement setting out the terms on which the defendants could use the plaintiffs' lands for the temporary ground anchors. This was done on 1 November 1984 (MMY12). Nothing appeared to have been done by the plaintiffs about the draft agreement submitted to them and on 24 January 1985 the first defendants wrote to the plaintiffs' consultants MMY14 asking for their comments on the draft agreement. There is no evidence disclosed in the affidavits filed of any activity in respect of the matter thereafter until early May 1985 when by a letter dated 10 May 1985 (MMY15) another set of proposed terms of agreement between the parties was delivered to the plaintiffs' consultants by the first defendants' agents. Before anything was done about the first set of terms on or about the 13 May 1985 serious cracks were observed on various parts of the plaintiffs' building and even on the grounds. The first defendants' contractor, the second defendants, wrote their letter of 13 May 1985 to the first plaintiff (MMY34) apologising for the damage and giving assurances of rectifying the damage and undertaking to pay compensation therefor. They went on to write in their 3rd paragraph:

> We wish to assure you that we will endeavour our best to rectify the damage to your satisfaction. Meanwhile, we recommend that the rectification works to be carried out after the completion of our Ground Anchoring work. We are of the opinion that the damage was caused by the stressing movement of the soil. It will be better to do the rectification work after the stressing of all the Ground Anchors and complete settlement of the soil in order to do a good job.

The plaintiffs' response to that letter is MMY35 dated 15 May 1985.

> Thank you for your letter dated 13 May 1985 and for your quick response to the above matter.
>
> Kindly let us know when will the rectification work be done to my house.
>
> As discussed, please inspect the cracks etc. at regular intervals to ensure that further damages are not done to the house.

This was however followed by the plaintiffs' consultants' letter of 17 May 1985 MMY40 written on the plaintiffs' instructions (MMY18) requiring the defendants to cease the further driving in of ground anchors until the parties had agreed on the terms on which the plaintiffs' lands could be utilised.

Thereafter negotiations between the parties for an agreement on the ground anchors appear to have resumed. On 21 May 1985 the defendants' Siah Koon Kee wrote his letter (SKK7) to the plaintiffs' consultants:

> ... We are proceeding with our ground anchoring work to the subject property and we shall continuously monitor the damage to the house and we will carry out repair works to any of the damages to your satisfaction. However, on the subject of open excavation along our common boundary. We await your immediate feedback for our further action.

On 21 May 1985 the plaintiffs' consultant Dr. Wong wrote his comments CCW4 on the basis that the ground anchors had been installed. What he thought ought to be done at that stage was to fix a 30-month period during which there would be such overlapping of the construction activities on both sides to the end that each side could obtain maximum benefit therefrom.

Meanwhile there were meetings to resolve the issue of the damage to the plaintiffs' house.

In August 1985 (see SKK10 dated 13 August 1985) Dr. Wong was exchanging details of the proposed development on the plaintiffs' land for details of the ground anchors. Clearly the parties was trying to find an engineering solution to the problem based on the basis that the existence of the ground anchors in the plaintiffs' two lots was a *fait accompli*.

However on 20 November 1985 the plaintiffs' solicitors wrote to the defendants' solicitors suggesting that an engineering solution had not been found.

Further correspondence between the solicitors ended with the plaintiffs' solicitors filing their writ whereby they seek an injunction restraining the defendants from driving into the plaintiffs' lands ground anchors and requiring the defendants to remove all ground anchors that had been installed. This was followed by an *ex parte* summons for interlocutory orders similar to the orders sought by the writ. On 5 December 1985 the matter was disposed of *ex parte* and they obtained the orders which the defendants now seek to have set aside, alternatively varied.

The defendants contend that there was either express or implied consent given to them to install the ground anchors and that in any event there was acquiescence on the part of the plaintiffs which disentitles them to the equitable reliefs they have sought. Further there was delay from May till December which would be also deprive them of equitable relief at the interlocutory stage.

While I agree with Encik Wong Weng Kwai that the affidavit evidence does suggest that while the parties were negotiating the defendants had stolen a march on the plaintiffs and had commenced the installation of the ground anchors, it cannot be denied that the documents exhibited to the affidavits filed show that the plaintiffs appeared to have acquiesced at the trespass and had appeared more concerned with having repairs effected to the damaged house and with arriving at terms with the first defendants for the plaintiffs to carry out their project which called for making certain encroachments into the defendants' lands.

Section 54(h) of the Specific Relief Act 1950 deprives a plaintiff of relief by an injunction where there has been acquiescence of the wrong.

In my judgment in this case there are within the meaning in *American Cyanamid* serious questions to be tried. It is my respectful view that if the Judge who heard the *ex parte* application had had her mind directed to the issue of acquiescence and to the fact that between May when the plaintiffs had realised that ground anchors had been driven into their land and December when they went to Court, some 6 months had passed (particular attention to both matters does not appear to have been brought to her notice) it is doubtful that she would have made the interlocutory mandatory orders on an *ex parte* basis and in the terms that they were made.

In the face of the evidence supporting the contention of acquiescence and delay the plaintiffs would not normally have been entitled to the mandatory orders they sought at an interlocutory stage - certainly not in the terms in which they asked for the orders.

However what should not be overlooked is that the defendants have all along maintained that they say intend to remove the ground anchors. They have suggested a method of doing this which they will take about the same amount of time that it would take to have the job done by the method suggested by Dr.Wong the plaintiffs' consultant.

In the circumstances I think that the order to have the ground anchors removed should stand and having the balance of convenience of the parties in mind I think that justice of the case would be met by a variation of the order of 5 December 1985 by my giving an order in terms of prayer (c) of encl. (12). There will be an Order in terms of prayer (c) of encl. (12). Both parties shall have liberty to apply in respect of the implementation of the order of 5 December 1985 as varied hereby. The plaintiffs will pay the costs of and incidental to this application.

Also found at [1986] 1 CLJ 521